Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Performance Measurements and Standards for Interstate Special Access Services	)	CC Docket No. 01-321
	)	
Petition of U S West, Inc., for a Declaratory Ruling Preempting State Commission Proceedings to Regulate U S West's Provision Of Federally Tariffed Interstate Services	)	CC Docket No. 00-51
	)	
Petition of Association for Local Telecommunications Services for Declaratory Ruling	)	CC Docket Nos. 98-147, 96-98, 98-141
	)	
Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended	)	CC Docket No. 96-149
	)	
2000 Biennial Regulatory Review – Telecommunications Service Quality Reporting Requirements	)	CC Docket No. 00-229
	)	
AT&T Corp. Petition to Establish Performance Standards, Reporting Requirements, and Self-Executing Remedies Need to Ensure Compliance by ILECs with Their Statutory Obligations Regarding Special Access Services	)	RM 10329

COMMENTS OF QWEST COMMUNICATIONS INTERNATIONAL INC.

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COMMENTS OF QWEST COMMUNICATIONS INTERNATIONAL INC.

Qwest Communications International Inc. ("Qwest") respectfully files these comments on the necessity for federal performance measurements and standards for interstate special access services pursuant to the Federal Communications Commission's ("Commission" or "FCC") *Notice of Proposed Rulemaking* in CC Docket No. 01-321.[1] The *Notice* proposes that the FCC

[1] *In the Matter of Performance Measurements and Standards for Interstate Special Access Services*, CC Docket No. 01-321, *et al.*, *Notice of Proposed Rulemaking*, FCC 01-339, rel. Nov.

establish measurement methodologies for calculating performance, minimum standards, and enforcement devices for the provision of interstate special access services by incumbent local exchange carriers ("ILEC"). Qwest, which operates as an ILEC, a competitive local exchange carrier ("CLEC") and an interexchange carrier ("IXC"), is a major supplier and purchaser of interstate special access services. As an ILEC, Qwest's annual sales of special access service are approximately $1 billion. As a CLEC and an IXC, Qwest purchases over $300 million in special access service from ILECs annually. Accordingly, Qwest brings a measured perspective to this proceeding.

The Commission's proposal to establish reporting requirements, set standards, and impose enforcement mechanisms for provisioning and repair of interstate access is unnecessary. Indeed, the proposal is directly contrary to the deregulatory approach that should be the lynchpin of Commission action under the Telecommunications Act of 1996 ("1996 Act"). Specifically, the 1996 Act and the Commission's deregulatory policies mandate a presumption in favor of maximum reliance on market forces and the lightest and most unobtrusive regulatory approach when regulation is needed. The regulatory paradigm established in the 1996 Act calls for promulgation of rules burdening any service provider only to the extent a compelling record supports them. Adoption of a new and burdensome regulatory approach to any issue should be eschewed, especially in the case of services like special access for which customers have a choice of suppliers. Competitive markets do not require reporting obligations, standards or penalties for efficient operation.

However, Qwest believes that the Commission can facilitate a more efficient operation of the special access market by adopting a handful of definitions and measures for use, on a

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19, 2001) ("*Notice*"). *See also* 66 Fed. Reg. 63651 (Dec. 10, 2001); *Order*, DA 01-2911, rel. Dec. 17, 2001.

voluntary basis, by buyers and sellers. Suppliers of special access services may use these measures to promote their performance and buyers may use them to make informed decisions. Qwest proposes those measures it finds most helpful as a buyer of special access. If the Commission adopts uniform definitions and measures, it will remain true to the deregulatory precepts of the 1996 Act, while helping to facilitate the flow of meaningful information.

The Commission cannot reconcile the policies underlying the 1996 Act with the adoption of federal standards to which carriers must adhere absent informed decisionmaking that market forces alone cannot ensure satisfactory performance. Qwest believes that no record can be developed that would support any such finding.

In any event, the adoption of mandatory, self-executing fines and penalties, as described in the *Notice*, is not merely bad policy, it is outside the Commission's authority. The Communications Act of 1934, as amended, is very clear -- no monetary order, whether money be directed to be paid to the United States or to another party, may be enforced without granting the affected carrier significant due process rights, including, in most instances, judicial review which is detailed and searching. The plain language of the Communications Act dealing with this necessary process would prohibit self-executing penalties.[2]

I. THE 1996 ACT AND THE COMMISSION'S POLICIES ESTABLISH A PRESUMPTION IN FAVOR OF DEREGULATION OR LESSENED REGULATION

The *Notice* proceeds on an implicit presumption that government regulation, not market forces, is the preferred approach to ensuring the provision of special access services by ILECs. But this approach is contrary to the fundamental assumptions established under the 1996 Act.

[2] Qwest has entered into voluntary enforcement plans with state regulators for interconnection performance. These standards were voluntarily adopted and do not stand for the proposition that any regulator has the jurisdiction to adopt such an enforcement plan without the consent of a regulated entity.

The Commission should start with the presumption that regulation is not necessary or desirable, and place the burden on those who contend otherwise.

The 1996 Act itself is quite explicit in this regard, charging the Commission with conducting a review of existing regulations to determine "whether any . . . regulation is no longer necessary in the public interest as the result of meaningful economic competition between providers of [services subject to the regulation]."[3] The Commission's mandate in the case of unnecessary regulations is clear: "The Commission shall repeal or modify any regulation it determines to be no longer necessary in the public interest."[4] The Commission has repeatedly reaffirmed that the 1996 Act "set a clear national policy that competition leading to deregulation, rather than continued regulation of dominant firms, shall be the preferred means for protecting consumers."[5]

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[3] 47 U.S.C. § 161(a)(2).

[4] 47 U.S.C. § 161(b).

[5] *In the Matter of Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from; MediaOne Group, Inc., Transferor, To AT&T Corp. Transferee, Memorandum Opinion and Order,* 15 FCC Rcd. 9816, 9821 ¶ 10 (2000). *See In the Matter of Application of WorldCom,Inc. and MCI Communications Corporation for Transfer of Control of MCI Communications Corporation to WorldCom, Inc., Memorandum Opinion and Order*, 13 FCC Rcd. 18025, 18034-35 ¶ 14 (1998); *In the Matter of Federal-State Joint Board on Universal Service, Report to Congress*, 13 FCC Rcd. 11501, 11507-08 ¶ 13 (1998); *In the Matter of Rules and Policies on Foreign Participation in the U.S. Telecommunications Market*, *Market Entry and Regulation of Foreign-Affiliated Entities, Report and Order and Order on Reconsideration*, 12 FCC Rcd. 23891, 23893 ¶ 1 (1997); *In the Matter of Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services In Michigan, Memorandum Opinion and Order,* 12 FCC Rcd. 20543, 20554 ¶ 19 (1997); *In the Applications of NYNEX Corporation Transferor, and Bell Atlantic Corporation, Transferee, For Consent to Transfer Control of NYNEX Corporation and Its Subsidiaries, Memorandum Opinion and Order*, 12 FCC Rcd. 19985, 19989 ¶ 5 (1997); *In the Matter of Policy and Rules Concerning the Interstate, Interexchange Marketplace, Implementation of Section 254(g) of the Communications Act of 1934, as amended, 1998 Biennial Regulatory Review – Review of Customer Premises Equipment And Enhanced Services Unbundling Rules In the Interexchange, Exchange Access And Local Exchange Markets, Report and Order*, 16 FCC Rcd. 7418, 7423-24 ¶ 8 (2001).

This emphasis on deregulation and competition in the 1996 Act is consistent with the growing recognition that there are limitations on the amount of salutary impact a regulatory agency can have on an industry, particularly one marked by rapid and dramatic technological change and innovation. The regulatory process is designed to be careful and thoughtful, and proper administrative process invariably takes time. In the telecommunications industry, it is recognized that competition and deregulation are, in many instances, better suited to protect consumers and promote the public interest than even the most carefully tailored regulations. And deregulation may be the best protector of the public even in those situations where competition has not fully taken hold.

The rationale for a deregulatory approach in telecommunications has been well stated by Chairman Powell over the years. Then Commissioner Powell has observed that "[t]he greatest danger for regulators is our inability to keep pace with the speed of developments and innovations that [new technological developments] will unleash."[6] On another occasion, he explained the key relationship between deregulation and emerging competition as follows:

> [W]hile policymakers should recognize that deregulation can be critical in allowing private firms to compete more vigorously, as a general matter, we should not withhold deregulation until after competition has matured to some ill-defined level. Again, this approach treats competition as a destination rather than a journey. Even more troubling, this approach suggests that deregulation should not be pursued for its own benefits but only as a reward or inducement for promoting (or coercing) behavior in private markets.
>
> Competition is a dynamic process that serves to allocate resources to their highest and best uses and to promote innovation. Because competition is not static, there will be no point at which competition "arrives" and thus regulators should not justify continued regulation on the notion that such arrival will occur. . . . I submit that if we condition deregulation on competition, we will never agree on a vision of the latter because this *quid pro quo* thinking cannot produce a clear signal for when we should disembark from the regulatory train.

[6] Speech of Michael K. Powell before the Federal Communications Bar Association, delivered Oct. 28, 1998 "Bewitched, Bothered and Bewildered".

> Making competition a precondition for deregulation also ignores the fact that continued regulation imposes a direct opportunity cost on the competitive process, one that is difficult to quantify, but equally difficult to ignore.
>
> The "bottom line" for these observations is that there are reasons why we policymakers should pursue deregulation, whether or not we feel we have reached some "competition destination." In short, if we only had a brain, we would recognize that we can never fully anticipate how the market will develop or how it will respond to the policies that we implement, however well-intentioned.[7]

In this docket, and all others seeking to expand the scope of regulations imposed on carriers, the Commission should start with the presumption that the market can best protect consumers and the public in the absence of additional regulations, and impose new regulatory burdens only if a factual record demonstrates that they are necessary.

In the case of special access services, which are the focus of the instant *Notice*, the relevant facts indicate that the proponents of increased regulation of special access cannot come close to meeting the burden to justify increased regulation.[8]

II. SPECIAL ACCESS SERVICES ARE SUBJECT TO SUBSTANTIAL COMPETITION, FORECLOSING THE NEED FOR THE OVERLY REGULATORY APPROACH PROPOSED IN THE *NOTICE*

The Commission's *Notice* asks, in essence, whether the Commission should regulate the operational provisioning of special access.[9] Qwest believes that the market is sufficiently

[7] Speech of Michael K. Powell before the Federal Communications Bar Association, delivered May 27, 1998 "Somewhere Over the Rainbow: The Need for Vision in the Deregulation of Communications Markets".

[8] Moreover, even if the Commission were to determine that the record thus far compiled is not sufficient to make a final determination on the competitiveness of the special access market, the Commission is in the process of assembling this record in the Triennial Review proceeding. Accordingly, it is premature for the Commission to impose any type of intrusive requirements regarding special access performance unless and until it has reviewed the record compiled in the Triennial Review, considered the effect of the records in the Pricing Flexibility dockets, including recent filings, and made a specific finding that the competitive situation is not yet fully mature and that further regulation is necessary to protect the public.

competitive to warrant reliance on market forces, and that regulation of the kind proposed in the *Notice* would be unnecessary and counterproductive absent clear and convincing evidence that market forces are not working.

The market for special access is characterized by multiple suppliers providing choices for buyers. Various pending proceedings document the extent of special access and high-capacity competition. For example, in the Report entitled "Competition for Special Access Service, High-Capacity Loops, and Interoffice Transport," the market for high-capacity facilities and services was described as fully competitive.[10]

Moreover, the Commission has already recognized that special access is sufficiently competitive to permit pricing flexibility by ILECs upon a streamlined showing. Two and a half years ago, the Commission established a formula for granting pricing flexibility to ILECs providing special access services based on the existence of competition in specified MSAs.[11] Pursuant to this formula, ILECs are eligible for varying degrees of pricing flexibility for their

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[9] The *Notice* actually deals with three different regulatory obligations: reporting, standards and penalties.

[10] Filed as an attachment to the United States Telecom Association's ("USTA") Apr. 5, 2001 Joint Petition in CC Docket No. 96-98, this Report was prepared by USTA for BellSouth, SBC, Qwest, and Verizon ("Report"). The Report documents 218,445 miles of CLEC high-capacity special access services at the close of the third quarter of 2001, and annual CLEC special access/private line revenues of $7.4 billion at the same time (both numbers up 30 % or more from the prior year). Report at 6. The Report also detailed special access-like competition from non-CLEC wholesale suppliers, local fiber provisioning by IXCs, and fixed terrestrial wireless providers of high-capacity spectrum. *Id.* at 14-24. Qwest did not join in this Petition because it recommended consideration of the issue in the context of the upcoming Triennial Review. Nevertheless the facts supporting the Petition demonstrate that special access is competitive.

[11] *In the Matter of Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers; Interexchange Carrier Purchases of Switched Access Services Offered by Competitive Local Exchange Carriers; Petition of U S West Communications, Inc. for Forbearance from Regulation as a Dominant Carrier in the Phoenix, Arizona MSA, Fifth Report and Order and Further Notice of Proposed Rulemaking*, 14 FCC Rcd. 14221 ¶ 77 (1999) ("*Pricing Flexibility Order*"), *aff'd sub nom. WorldCom, Inc. v. FCC*, 238 F.3d 449 (D.C. Cir. 2001).

tariffed special access services based on the number of unaffiliated competitors that have collocated in the ILEC's wire centers (as a percentage of wire centers or revenue) and used non-ILEC transport facilities.[12] The extent of collocation provides a reasonable surrogate for actual measurements of competition, at least for the purpose of recognizing competitive constraints on pricing by ILECs of their special access services.[13] Qwest has filed a petition for pricing flexibility -- which has not been opposed by any party -- in which it demonstrated that the competitive conditions for Phase II pricing flexibility relief for transport exist in 31 of the 45 MSAs served by Qwest, and conditions for Phase I relief exist in two additional MSAs. For channel terminations, Qwest has demonstrated that it is entitled to Phase II relief in 20 MSAs, and Phase I relief in an additional 11 MSAs.[14] In other words, Qwest has documented competition in the provision of special access in 33 of its 45 MSAs. Other ILECs have sought and received pricing flexibility in similar numbers of MSAs in other parts of the country.[15]

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[12] *Id.* ¶ 77.

[13] *Id.* ¶¶ 81-86.

[14] Qwest Petition for Pricing Flexibility for Special Access and Dedicated Transport Services, filed Dec. 31, 2001.

[15] *In the Matter of Petition of Ameritech Illinois, Ameritech Indiana, Ameritech Michigan, Ameritech Ohio, and Ameritech Wisconsin for Pricing Flexibility, Petition of Pacific Bell Telephone Company for Pricing Flexibility, Petition of Southwestern Bell Telephone Company for Pricing Flexibility,* 16 FCC Rcd. 5889 (2001) - Ameritech -10 MSAs for Phase I and 11 MSAs for Phase II; Pacific Bell – 1 MSA for Phase I and 4 MSAs for Phase II; Southwestern Bell – 2 MSAs for Phase I and 13 MSAs for Phase II. *In the Matter of Verizon Petitions for Pricing Flexibility for Special Access and Dedicated Transport Services, Memorandum Opinion and Order*, 16 FCC Rcd. 5876 (2001) – 4 MSAs (and non-MSA study areas) for Phase I and 37 MSAs (and non-MSA study areas) for Phase II. *In the Matter of Sprint Petition for Pricing Flexibility for Special Access and Dedicated Transport Services*, *Memorandum Opinion and Order*, 16 FCC Rcd. 11005 (2001) – 7 MSAs for Phase I and Phase II. *In the Matter of Frontier Petition for Pricing Flexibility for Special Access and Dedicated Transport Services, Memorandum Opinion and Order*, 16 FCC Rcd. 13885 (2001) – 1 MSA.

In a competitive market, poor service performance results in customers choosing another provider. There is no reason to require the filing of federal performance measurements in the competitive access marketplace, and certainly not standards or penalties.

III. ANY COMMISSION ACTION SHOULD BE LIMITED TO FACILITATING THE OPERATION OF MARKET FORCES BY ADOPTING UNIFORM DEFINITIONS AND METHODOLOGIES THAT CARRIERS AND CUSTOMERS MAY USE TO COMPARE PERFORMANCE

In keeping with the presumptions in the 1996 Act favoring deregulation, Qwest sees a useful role for the Commission to encourage the voluntary use of uniform and meaningful definitions and measurement methodologies. Markets operate best when information is available in a form that can be used by customers. Uniform definitions and measurements for special access can help consumers evaluate choices for special access, and they would allow both buyers and sellers voluntarily to compare the availability of special access and the performance histories of providers of special access.

Qwest emphasizes that there is no need to mandate that any carrier utilize these measurements, or that the results of these measurements be filed with the Commission. Market forces will ensure that the information is available. Suppliers of special access services want to tout their performance, and they will be better able to do so if carriers use the same definitions and measures. Purchasers of special access services will demand this information from prospective suppliers. Comparisons of "apples to apples" will provide more information about special access to market participants and facilitate more informed decisionmaking.

The handful of meaningful measurements that Qwest, as a buyer, would like to have to assess the availability and quality of special access services is described below. In submitting these potential measures, Qwest again emphasizes that it is not proposing that any standards be adopted based on these measurements. It fully expects that market forces will require all carriers

providing special access to use the Commission's definitions and measures when making affirmative claims.

A. Order Confirmation

Order confirmation is a measure of the amount of time it takes to confirm whether an order has been accepted or rejected.

B. Percentage Of On-Time Performance

Percentage of on-time performance measures the percentage of orders completed on or before the first confirmed due date (or a subsequent date established by the buyer). This measure should be crafted to accommodate exclusions when the buyer is not ready to accept delivery or turn up of the service.

C. Installation Quality

Installation quality is a measure of the percentage of completed orders for which a trouble ticket is issued within 30 days of completion of the order.

D. Time To Restore

Time to restore measures promptness in restoring services after a buyer refers a problem to the carrier for resolution, calculated as the mean time to restore service.

E. Repeat Trouble Rate

Repeat trouble rate measures the percentage of repeat trouble tickets for the same circuit within any 30 day period.

This handful of measures would allow buyers and sellers to compare their performance. Buyers obviously would have more meaningful and uniformly calculated information with which to make choices; sellers can see how they "stack up".

IV. THE ADOPTION OF MANDATORY, SELF-EXECUTING FINES AND PENALTIES IS UNNECESSARY AND WOULD BE UNLAWFUL

Because mandatory reporting or the adoption of minimum standards is unnecessary and would be contrary to the Commission's pro-competitive and deregulatory policies, it follows that mandating fines and penalties is likewise unnecessary. But, even if the Commission disagrees with this conclusion as a policy matter, it lacks the authority to implement fines or penalties as suggested in the *Notice*.

The *Notice* requests comment on the legality and/or feasibility of the establishment of self-executing penalties for violation of performance standards.[16] The Commission also seeks comment on the lawfulness of establishing "base forfeiture amounts" for failure to meet established special access performance standards.[17]

The suggestion that the Commission is considering imposition of forfeitures -- including the possibility of self-executing damages to third parties and forfeiture processes streamlined by "baseline" forfeiture amounts -- raises significant statutory issues. The assessment of fines, forfeitures, monetary penalties and damages by the Commission is severely curtailed by the Communications Act, which ensures that no monetary penalty may be demanded of a carrier unless full due process has been afforded in that particular instance. In fact, no monetary penalty can be enforced against a carrier in the absence of a full judicial proceeding at which the carrier has the right to challenge on a *de novo* basis the Commission's finding that a penalty is due. Imposition of "automatic" damage awards or "baseline" forfeiture amounts would violate these legal constraints and be unlawful.

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[16] "We also seek comment on the lawfulness and feasibility of adopting a self-effectuating liquidated damages rule similar to those that have been adopted by some states, where failure to comply with the standards would result in automatic payments to competitors." *Notice* ¶ 12.

[17] *Id.*

What is more, there is no way for the Commission reasonably to determine in advance that any performance is unreasonable under the Act to the extent that penalties are appropriate, self-executing or otherwise. ILECs are incented to provide good special access service by economic factors -- primarily the opportunity of customers to seek other providers of high-capacity point-to-point service if ILEC provisioning is substandard. Any effort by the Commission to penalize an ILEC for provisioning "deficiencies" in the field of special access provisioning would of legal necessity be fact specific and could be made only after affording the ILEC full due process as called for under the Communications Act.

A. If The Commission Directs A Carrier To Pay Money To Another Person, The Carrier Is Entitled To A Trial *De Novo* Before A Court Prior To Satisfaction Of The Directive

Commission orders directing the payment of money to another person are treated in a manner unlike all other Commission orders. Orders that do not involve monetary payments take effect when specified by the Commission, and must be complied with immediately unless the order is stayed by a court of competent jurisdiction.[18] Section 408 of the Act, the operative section dealing with the effective date of Commission orders, expressly states that it applies to all orders "other than orders for the payment of money[.]"[19] In the statutory scheme established by the Communications Act, orders entered under Section 408 *are* essentially self-executing, and can be challenged only by direct appeal under Section 402 of the Act.[20] In any proceeding to

[18] 47 U.S.C. § 408.

[19] *Id.*

[20] 47 U.S.C. § 402(a) or (b).

enforce such an order, the order is conclusively presumed to be valid and may not be challenged so long as it has been regularly made and duly served.[21]

Orders for the payment of money, however, are treated differently. Under Section 407 of the Act,[22] the party ordered to pay money is entitled to refuse to pay it and to defend against the lawfulness of the order in a collection action brought against that party in a federal district court.[23] Rather than being binding on the court, the FCC's monetary order is only "*prima facie*" evidence of the facts found in the order -- the order is otherwise subject to full review by the court.

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[21] 47 U.S.C. § 401. *See, e.g., Southwestern Bell v. Public Utility Commission of Texas*, 812 F. Supp. 706, 708 (W.D. Tex. 1993).

[22] 47 U.S.C. § 407 reads:

> If a carrier does not comply with an order for the payment of money within the time limit in such order, the complainant, or any person for whose benefit such order was made, may file in the district court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the line of the carrier runs, or in any State court of general jurisdiction having jurisdiction of the parties, a petition setting forth briefly the causes for which he claims damages, and the order of the Commission in the premises. Such suit in the district court of the United States shall proceed in all respects like other civil suits for damages, except that on the trial of such suits the findings and order of the Commission shall be prima facie evidence of the facts therein stated, except that the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings unless they accrue upon his appeal. If the petitioner shall finally prevail, he shall be allowed a reasonable attorney's fee, to be taxed and collected as part of the costs of the suit.

[23] *See ICC v. Atlantic Coast Line R. Co.*, 383 U.S. 576, 594 (1966). Sections 407 and 408 of the Communications Act were lifted directly from their counterpart provisions of the Interstate Commerce Act, which was interpreted by the Supreme Court in *Atlantic Coast Line*. *See* H.R. Rep. No. 1850, 73d Cong., 2d. Sess., June 1, 1934, at 8. *See also MidAmerican Communications Corp. v. U.S. West Communications, Inc.*, 857 F. Supp. 772, 774 (D. Colo. 1994). There are other provisions from the Interstate Commerce Act that also were incorporated into the Communications Act, which has been noted by the Supreme Court. *See, e.g, Federal Maritime Commission v. Seatrain Lines, Inc*., 411 U.S. 726, 742-43 (1973); *MCI Telecommunications v. American Tel. & Tel.*, 512 U.S. 218, 229-30 (1994); *AT&T v. Central Office Telephone, Inc*., 524 U.S. 214, 221-22 (1998).

The law regarding the Commission's authority to enforce its own damages awards is set forth in *Interstate Commerce Commission v. Atlantic Coast Line R. Co.*:

- An order by the Commission directing a carrier to pay money to another private individual or company may be enforced only by a court, not the Agency.[24]
- Lawsuits against carriers to enforce an order for damages entered by the FCC grant plaintiffs their choice of forum, avoidance of costs, and possible award of attorneys' fees, and these suits may rely on the FCC order only as "*prima facie*" evidence of the factual findings in the order.[25]
- Defending carriers may obtain full review of a Commission liability order in a Section 407 enforcement order.[26]

The vitality of these premises is evidenced by the denial of stays of Commission money orders because the absence of an obligation to comply with the order eliminates the possibility of irreparable harm.[27] The case of *Central Vermont Railway, Inc. v. United States*[28] presented this proposition under the Commerce Act. In that companion proceeding to Section 407, an ICC administrative damages order had been entered against a carrier. The carrier, in addition to appealing the order, sought a stay of the payment requirement. The reviewing court denied the stay, holding that the carrier was under no duty to pay any damages amount until and unless the shipper had brought a successful collection action under the ICC's version of Section 407 of the Communications Act. The Court observed:

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[24] *See Atlantic Coast Line*, 383 U.S. at 579-80.

[25] *Id.* at 580-81.

[26] *Id.* at 589-90.

[27] *See Cincinnati Bell Telephone Co. v. FCC*, No. 93-3214, Order (6th Cir., May 7, 1993).

[28] 231 F. Supp. 967 (D. Vt. 1964).

> Since 49 U.S.C.A. § 16(2) is applicable it means that the plaintiff herein cannot be damaged since it need not pay any of the reparations in issue. It cannot be held in contempt or be forced to make such reparation until a shipper to whom such reparations are due brings suit under [Section] 16(2) and prevails in the resulting action.[29]

Because the ICC was without power to coerce payment of a private damages award, there was no basis on which to grant a judicial stay of the order.

In other words, an FCC damages award may not be self-executing. A carrier need not pay any such an award until a complaining party brings suit in court, and following a full and fair hearing on the merits of the underlying claim.

B. Any Forfeiture Or Penalty Order By The FCC Can Be Enforced Only By Way Of An Independent Judicial Action Brought By The Attorney General Pursuant To Section 504 Of The Communications Act

A similar statutory structure limits the FCC's authority to set baseline forfeiture amounts in a manner that would cut off the ability of a carrier to challenge the legitimacy of the forfeiture action. Forfeitures are not only not self-executing, but they are interlocutory. Because they are interlocutory, forfeiture orders are not appealable and can be reviewed only if the United States seeks to enforce them through a specific action under Section 504 of the Act. Section 504(a) reads, in pertinent part:

> The forfeitures provided for in this chapter shall be payable into the Treasury of the United States, and shall be recoverable, except as otherwise provided with respect to a forfeiture penalty determined under section 503(b)(3) of this chapter, in a civil suit in the name of the United States brought in the district where the person or carrier has its principal operating office or in any district through which the line or system of the carrier runs: *Provided*, That any suit for the recovery of a forfeiture imposed pursuant to the provisions of this chapter shall be a trial de novo. . .[30]

[29] *Id.* at 968.

[30] 47 U.S.C. § 504(a).

In the case of a forfeiture assessed under this Section of the Act (which the forfeitures being considered in the *Notice* would be), the carrier has the right to obtain judicial review only by insisting that the Government institute action under Section 504(a).[31] The statutory process was described in *Action for Children's Television v. FCC*, 59 F.3d. 1249, 1254 (D.C. Cir. 1995), *cert. denied*, 516 U.S. 1072 (1996):

> Generally the forfeiture order recapitulates the history of the case, addresses any arguments raised by the broadcaster in response to the [notice of apparent liability], and orders payment of the forfeiture within 30 days. As with any Commission order, the broadcaster may petition for reconsideration, . . . but it may not obtain judicial review at that stage. If the order becomes final and the broadcaster does not pay the forfeiture, the Commission issues progressively stiffer dunning letters, and threatens to refer and after 165 days does indeed refer the matter to the Department of Justice "for commencement of [a] civil action[.]"

The only exception to this rule is found in Section 503(b)(3) of the Act, which provides for notice and an opportunity for a hearing (and specifically provides for judicial review under Section 402(a) of the Act.)[32]

Accordingly, in the statutory scheme provided by the Act, no forfeiture assessed by the Commission can be self-executing. In the case of a forfeiture order after a full hearing, the very requirement for a hearing would be inconsistent with the notion of "baseline" forfeiture amounts or similar self-executing devices raised by the *Notice*.

V. STATES DO NOT HAVE JURISDICTION TO ADDRESS PERFORMANCE MEASUREMENTS AND STANDARDS FOR INTERSTATE SPECIAL ACCESS

The *Notice* seeks comment on whether the states can "play a role regarding interstate special access services."[33] The key questions here are the legal authority of state commissions to

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[31] *See Pleasant Broadcasting Company v. FCC*, 564 F.2d. 496, 500-03 (D.C. Cir. 1977). *See also Dougan v. FCC*, 21 F.3d 1488, 1490-91 (9th Cir. 1994); *Miami MDS Company v. FCC*, 14 F.3d 658, 661 (D.C. Cir. 1994).

[32] 47 U.S.C. §§ 503(b)(3)(A) and 402(a).

regulate interstate services, the extent to which the Commission may delegate *its* authority to state commissions, and the advisability of such a delegation, to the extent legally permissible.

The Communications Act provides that the regulation of interstate access services is exclusively within the Commission's jurisdiction. In stark contrast to the provisions of the 1996 Act which assign to the Commission and its state counterparts complementary roles in promoting the development of competition for local services, the 1934 Act assigns exclusive jurisdiction over interstate services to the Commission. With limited exceptions expressly written into the Act,[34] Congress left no room for states to regulate interstate services. Section 2(a) of the Act grants the Commission sole jurisdiction over all interstate and foreign wire communications,[35] and Title II of the Act establishes a comprehensive regulatory structure to govern interstate tariffed services. Sections 201 and 202 of the Act establish federal requirements for reasonable carrier provision of service and connectivity and a federal prohibition against discrimination.[36] The special access services of ILECs are required to be tariffed at the FCC, and ILECs may not deviate from the terms of those tariffs in their service offerings.[37] Actions claiming violations of the Communications Act and its implementing rules must be brought before either this Commission or a federal district court.[38] Congress has fully occupied the filed of regulation of

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[33] *Notice* ¶ 11.

[34] *AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 384-86 (1999).

[35] 47 U.S.C. § 152(a).

[36] 47 U.S.C. §§ 201 and 202.

[37] 47 U.S.C. § 203. CLECs generally do not file tariffs, and the arguments here dealing with the primacy of a federal tariff do not necessarily apply to CLECs.

[38] 47 U.S.C. §§ 401, 502.

interstate telecommunications services, leaving no room for state regulation of services purchased out of a carrier's interstate tariffs.[39]

As the Commission recognizes, interstate special access circuits can often carry intrastate traffic -- indeed, the circuit is classified as interstate if it carries as little as ten percent interstate traffic.[40] The argument has been made that carriage of this intrastate traffic grants state regulators the authority to regulate interstate special access circuits.[41] But this argument misses the point. The Commission's jurisdiction (and Section 2(b)'s jurisdictional exclusion) applies to interstate "communication services." If a service is subject to federal regulation, it is considered an interstate communications service in its entirety, regardless of whether some intrastate communications traffic is carried by the service.

Moreover, even if it were so motivated, the Commission could not delegate its authority over interstate special access services to state regulators. The Commission's duty is to "execute and enforce" the provisions of the Communications Act.[42] This duty is not one which can be deferred or ignored.[43] The Commission could no more delegate its responsibility to execute and

[39] *Cipollone v. Liggett Group*, 505 U.S. 504, 516 (1992); *Fidelity Savings and Loan v. De la Cuesta*, 347 U.S. 141, 153 (1982). Congress granted the FCC plenary authority over interstate telecommunications in order that the Commission could establish uniform national policies, avoiding balkanization of national telecommunications policy. *See Arizona Corporation Commission*, 10 FCC Rcd. 7824, 7828 (1995); *Atlantic Richfield Company*, 3 FCC Rcd. 3089, 3092 (1988), *aff'd sub nom. Texas Public Utilities Commission v. FCC*, 886 F.2d 1325 (D.C. Cir. 1989).

[40] *In the Matter of MTS and WATS Market Structure, Decision and Order*, 4 FCC Rcd. 5660 ¶ 2 (1989), 47 C.F.R. § 36.154(a), Subcategory 1.2.

[41] *See* AT&T's Response to U S WEST's Petition for Declaratory Ruling, CC Docket No. 00-51, filed Apr. 24, 2000.

[42] 47 U.S.C. § 151.

[43] *See Southwestern Bell Corp. v. FCC*, 43 F.3d 1515, 1523 (D.C. Cir. 1995); *Telecommunications Research and Action Center v. FCC*, 836 F.2d 1349, 1356 (D.C. Cir. 1988).

enforce the Communications Act (including regulation, if necessary, of interstate special access services) than it could decline to carry out its statutory responsibilities altogether.

VI. CONCLUSION

As discussed herein, the Commission's proposal to establish reporting requirements, impose standards, and craft enforcement mechanisms for provisioning and repair of interstate access is unnecessary. Competitive markets do not require the creation of measures, reporting obligations, standards or penalties for efficient operation, and the market for special access is sufficiently competitive that there is no need for Commission intervention. The Commission should, however, identify a modest number of meaningful descriptions and measurement methodologies for use by buyers and sellers of special access to promote a more efficient operation of the market.

The Commission should not attempt to impose performance standards or to enact fines, penalties, damages or other enforcement mechanisms related to any performance measurement. Such enforcement tools are not justified based on the current state of competition, and if the Commission attempts to enact a "self-executing" regime or if it tries to delegate authority to the states, it would exceed its statutory authority.

Respectfully submitted,

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